

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

JOSEFINA RODRÍGUEZ-BIRD,

Plaintiff,

v.

SANTANDER SECURITIES CORP. and
ARTURO COLÓN,

Defendants.

Civil No. 09-2238 (JAF)

OPINION AND ORDER

Plaintiff, Josefina Rodríguez-Bird, brings the present action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), against Defendants Santander Securities Corp. (“Santander”) and Arturo Colón. (Docket No. 1.) Santander moves to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Docket No. 9.) Plaintiff opposes. (Docket No. 15.) Santander replies in support of the motion to dismiss. (Docket No. 21.)

I.

Factual and Procedural Synopsis

We derive the following facts from Plaintiff’s complaint (Docket No. 1) . Plaintiff is a retiree who invested her life’s savings, \$455,000, with UBS investment bank. Defendant Arturo Colón managed Plaintiff’s funds at UBS. When Colón left UBS for a position with Defendant Santander Securities Corporation (“Santander”), he asked Plaintiff to transfer her funds to Santander. On April 16, 2004, Plaintiff signed an agreement (Docket No. 24-1) opening a margin account with Santander. Plaintiff alleges that she did not have a basic understanding

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1 of what a margin account was or the risks involved. She contends that Defendants took
2 advantage of her and, through various misrepresentations, caused her to invest her retirement
3 savings in a risky margin account. Furthermore, Plaintiff alleges that the paperwork she signed,
4 opening a new margin account, was blank and that Colón later filled in the form with fraudulent
5 information. For instance, her annual income was listed as \$85,000, when in actuality it was
6 closer to \$35,000. In addition, Plaintiff's liquid net worth was misstated at \$1,700,000 as
7 opposed to \$455,000. Finally, the margin account opening form stated that she had six years
8 of investment experience when she really had none. Plaintiff was required to acknowledge the
9 receipt of a copy of a pre-dispute arbitration agreement, which she allegedly did not receive.

10 Plaintiff alleges that, owing to continued misrepresentations and acts of churning¹ by
11 Defendants, her account dwindled from \$455,000 to \$8,000. On December 11, 2009, Plaintiff
12 filed a complaint in this court, invoking the Securities Exchange Act's prohibition on the use
13 of manipulative or deceptive devices in buying or selling securities. See 15 U.S.C. § 78j(b).
14 Santander moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and (6) and to
15 compel arbitration, arguing that Plaintiff had signed a valid arbitration agreement. (Docket
16 No. 9.) Colón joins Santander's motion. (Docket No. 11.) Plaintiff opposed Defendants'
17 motion to dismiss, claiming that she had never seen the arbitration agreement and that the

¹ "A stockbroker's excessive trading of a customer's account to earn more commissions rather than to further the customer's interests; an abuse of a customer's confidence for personal gain by frequent and numerous transactions, disproportionate to the size and nature of the customer's account." Black's Law Dictionary 275 (9th ed. 2009).

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1 agreement was entered into fraudulently. (Docket No. 15.) Santander replied to Plaintiff's
2 opposition. (Docket No. 21.)

3 II.

4 Standard for Motion to Compel Arbitration

5 The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, governs the enforcement of
6 most arbitration agreements by federal courts and embodies a federal policy strongly favoring
7 the enforcement of arbitration agreements. See, e.g., Campbell v. Gen. Dynamics Gov't Sys.
8 Corp., 407 F.3d 546, 551–52 (1st Cir. 2005) (discussing federal policy). In granting a motion
9 to compel arbitration, we must determine that an arbitration agreement exists; that the claims
10 before us fall within the scope of said agreement; and that the movant has not waived its arbitral
11 rights. See Combined Energies v. CCI, Inc., 514 F.3d 168, 171 (1st Cir. 2008). The threshold
12 inquiry, whether a valid agreement to arbitrate exists, is a question of state law to be determined
13 by the court. Campbell, 407 F.3d at 552. In making this determination, we view an arbitration
14 clause as severable from the contract as a whole. See Prima Paint Corp. v. Flood & Conklin
15 Mfg. Co., 388 U.S. 395, 403–04 (1967). While we are empowered to adjudicate challenges to
16 the validity of an arbitration clause itself, we must reserve challenges to the general validity of
17 a contract for the consideration of an arbitrator in the first instance. Buckeye Check Cashing,
18 Inc. v. Cardegna, 546 U.S. 440, 445–446 (2006); see also Sleeper Farms v. Agway, Inc., 506
19 F.3d. 98, 103 (1st Cir. 2007) (holding that federal courts must enforce an arbitration clause even
20 if the larger contract is otherwise void or voidable).

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1 If we grant a motion to compel arbitration, we must stay proceedings on all arbitrable
2 claims. See 9 U.S.C. § 3. In a case over which we have jurisdiction under 28 U.S.C. § 1331,
3 a finding that all federal claims are arbitrable, such that we have only supplemental jurisdiction
4 over the remaining claims, allows us to dismiss the case in its entirety. See Bercovitch v.
5 Baldwin Sch., Inc., 133 F.3d 141, 156 n.21 (1st Cir. 1998).

6 III.

7 Analysis

8 Plaintiff asserts three theories as to why arbitration should not be compelled: (1) she was
9 not shown and she did not read a copy of the arbitration agreement before signing it; (2) the
10 arbitration agreement was fraudulent due to the misinformation contained in the new account
11 form; and (3) the arbitration clause is unconscionable. All three pertain to the first prong of any
12 arbitration analysis under the FAA²— the existence of an arbitration agreement.³

13 As a preliminary matter, we note that the arbitration clause is a facially-valid contract.
14 Puerto Rico law states that a valid bilateral contract is formed when consenting parties agree
15 to a definite object, so long as each party gives consideration for the object of the contract. See
16 31 L.P.R.A. §§ 3391, 3341 (1990). Plaintiff and Defendants consented to a definite object, to
17 arbitrate any disagreements that may arise between them over the account Plaintiff was opening.

² Neither party challenges the applicability of the FAA to this contract to open a securities trading account; a contract that clearly implicates interstate commerce. See 9 U.S.C. § 2.

³ Plaintiff makes no argument that the claims at issue fall outside of the scope of the arbitration clause. The clause is broadly worded and covers “any controversy between us arising out of . . . this agreement.” (Docket No. 24-1.) Nor has there been any indication of waiver. Plaintiff submitted a demand letter raising only the possibility of mediation (Docket No. 15-4), to which Defendants did not respond.

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1 The consideration for this agreement was the waiver of the right to litigate their disputes in a
2 court of law.

3 First, Plaintiff alleges that the arbitration agreement is void because she was never shown
4 a copy of it. (Docket No. 1.) The “New Account Form” signed by Plaintiff when transferring
5 her funds to Santander includes the following language directly above her signature: “Please
6 review your information, read the Agreement on page 8, and sign below. Keep a copy for your
7 records. **NOTE:** This document contains a predispute arbitration clause, which appears on page
8 8 in paragraphs 13 and 14.” (Docket No. 24-1 at 7 (emphasis in original).) Plaintiff has not
9 disputed the authenticity of her signature immediately following this language, only that she
10 never received the eighth page of the agreement containing the arbitration clause.

11 Puerto Rico’s Civil Code stipulates that a party’s consent to a contract will be void only
12 when “given by error, under violence, by intimidation, or deceit.” 31 L.P.R.A. § 3404. Plaintiff
13 has not alleged that she signed the contract under intimidation or threat of violence. As for
14 deceit, we fail to see how Defendants could have deceitfully withheld page eight, when the
15 language above Plaintiff’s signature put her on notice that she was consenting to an arbitration
16 agreement printed on a separate page. To the extent Plaintiff claims her consent is void because
17 of error, we find that it is not the type of “excusable error” that would void consent under Puerto
18 Rico law. See Capó v. Ramos, 83 P.R. 625, 649 (1961). An error is inexcusable—and thus
19 cannot void consent—if the “ignorance of the true state of . . . things is due to negligence or
20 fault of the one who invokes it.” Id. Here, the form signed by Plaintiff clearly instructed her
21 to read page eight before signing, and specifically warned that an arbitration clause was

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1 contained therein. If the application Plaintiff signed was missing page eight, the onus was on
2 her to request a copy to read before signing.

3 Plaintiff's second argument is that the arbitration agreement should not be enforced
4 because it was fraudulent. This argument, however, goes to the larger contract, and not to the
5 arbitration clause specifically. Plaintiff argues that inflated financial figures in the application
6 were fraudulent and render the contract invalid. Under Puerto Rico law, a contract may be
7 invalid if consented to as a result of deceit. 31 L.P.R.A. §§ 3404, 3408, 3409. Deceit is present
8 where "by words or insidious machinations on the part of one of the contracting parties[,] the
9 other is induced to execute a contract which without them he would not have made." § 3408.
10 But the law also draws a distinction between serious deceptions and incidental deceptions; only serious
11 deceptions will nullify a contract. § 3409. A serious deception is one that is necessary to a party's
12 consent and results in nullity, while an incidental deception merely influences consent and gives rise
13 to a claim for damages. See P.C.M.E. Commercial, S.E. v. Pace Membership Warehouse, Inc.,
14 952 F. Supp. 84, 92 (D.P.R. 1997) (discussing liability for fraud in the formation of a contract
15 under Puerto Rico law).

16 We must determine whether Plaintiff's misrepresented financial figures and investment
17 experience on Santander's new account form were the determining factor in Plaintiff's consent
18 to the arbitration agreement. While Defendants may have falsified certain aspects of the new
19 account application, this does not affect the arbitration clause, which the Supreme Court has
20 repeatedly stated is "severable from the remainder of the contract." Buckeye Check Cashing,
21 Inc., 546 U.S. at 445. We have already determined that the arbitration agreement was, on its

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1 face, a valid contract under Puerto Rico law. Potential misrepresentations of Plaintiff's
2 financial information concerned neither the object of nor the consideration for the arbitration
3 agreement—an agreement to arbitrate and a waiver of the right to litigate, respectively. As a
4 result, any fraud or misrepresentation of Plaintiff's financial information or investment
5 experience in the larger contract was not determinative of her consent to the arbitration clause.

6 Finally, Plaintiff argues that the arbitration clause is unconscionable and, thus, invalid.
7 Plaintiff's argument boils down to a contention that enforcing an arbitration agreement in light
8 of potential fraud in a larger contract is unconscionable. But Plaintiff has not pointed to, and
9 we have not found, any authority for the proposition that unconscionability may release a party
10 from contract under Puerto Rico law. Rather, Plaintiff argues that such considerations are
11 encompassed in the civil law's background requirement of good faith in contracting. See, e.g.,
12 Velilla v. Pueblo Supermarkets, Inc., 111 P.R. Offic. Trans. 732, 735–36 (1981) (“We hold that
13 the requirement of good faith is also a general requirement of our Law and that, as such, it
14 extends to our whole legal system. The ethical content of each act should be examined in the
15 light of its particular circumstances.”). Considering that the arbitration clause must be viewed
16 independently from the rest of the contract, and any fraud therein, we find no bad faith in the
17 Defendants' use of this boilerplate arbitration agreement when opening new accounts. It is a
18 standard agreement that is accepted in numerous transactions throughout our daily lives. We
19 reject this invitation to impute bad faith in the use of such an arbitration clause. Granted, there
20 may have been bad faith involved in Defendants' entering into the contract as a whole, wherein

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1 a retiree may have been duped into investing her life savings in a high-risk margin account. But
2 that is a determination to be made by the arbitrator in the first instance.

3 Jurisdiction in this case was premised on a single federal claim, which we have found
4 arbitrable. We, therefore, have discretion to dismiss the case in its entirety regardless of the
5 FAA's mandate to stay arbitrable claims. See Bercovitch, 133 F.3d at 156 n.21.

6 **IV.**

7 **Conclusion**

8 For the reasons stated herein, we hereby **DISMISS** Plaintiff's claims against Defendants
9 Santander and Colón without prejudice, instructing that the matter be placed in arbitration.
10 Upon termination of the arbitration process, the court may reopen the case to enforce the
11 arbitration award.

12 **IT IS SO ORDERED.**

13 San Juan, Puerto Rico, this 17th day of June, 2010.

14 s/José Antonio Fusté
15 JOSE ANTONIO FUSTE
16 Chief U.S. District Judge